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In the Supreme Court of the United States.

OCTOBER TERM, 1900.

THE JOSEPH SCHLITZ BREWING COMPANY, Appellant, v. THE UNITED STATES. } No. 232.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

The appellant brought suit in the Court of Claims for a drawback of the amount of duties paid by it upon certain imported hops, barley, bottles, and corks which it claimed it had used in the manufacture of bottled beer subsequently exported by it, the claim being based upon section 25 of the tariff act of October 1, 1890, and its reenactment in the act of August 28, 1894.

The court gave judgment for the drawback on hops and barley, but denied the claim as to the bottles and corks. Hence this appeal.

ARGUMENT.

The contention of the appellants is simple. It is also novel. It is that the bottles and corks which contain and cover the beer are (in the language of the drawback statute) "materials used in the manufacture of articles," and this equally with the hops and barley, out of which the beer contained in the bottles was made. And to support this startling proposition, it is adroitly urged that the finished product as exported is *bottled beer*, of which article the bottle and its cork are as much a part as the beer itself. This is true in a sense, as a precise designation of the article exported is undoubtedly beer in bottles, or bottled beer; but the statement as made is nevertheless sophistical, since the pertinent inquiry is not as to the nomenclature of the exported article, but solely: Were the bottles and corks materials used in manufacturing this article? Or, to state it otherwise: Do the bottles and corks, as a result of a process of manufacture, appear in the completed article as component parts thereof? Putting the question thus, substantially in the language of the statute which is relied upon as the foundation of the claim, it seems impossible to answer it in favor of the claimant.

AS TO "MANUFACTURE."

An able discussion of the term *manufacture* is to be found in an opinion of the honorable Solicitor of the Treasury, approved by the Treasury Department, given upon the question whether a drawback should

be allowed on imported corks used in bottling exported beer, from which I feel that I may well quote:

> In the present case the "imported materials" used in the so-called "manufacture" of the article were *already* "manufactured" corks before they were imported to the United States, coming within the classification of paragraph 416 of said act, and paying a duty of 15 cents or 25 cents per pound, according to size. No question is raised in the papers submitted that the article in question was not a "manufacture" of cork, in the sense of the statute, before it was imported. Besides, it must be observed that the corks are not exported as a substantive article, as the statute seems to contemplate, but are a means of securing or confining in bottles the article that is exported, namely, beer.
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> The word "manufacture" is an active verb, and signifies:
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> "1. To make or fabricate from raw materials, and work into forms convenient for use, especially by more or less complicated processes; as, to manufacture cloth, nails, or glass.
>
> "2. To work up into suitable form for use; as, to manufacture wool, cotton, silk, or iron." (Imperial Dictionary.)
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> In *Foppes* v. *Magone* (40 F. R., p. 570) it was held that to constitute a "manufacture" there must be a transformation; and mere labor bestowed upon an article, even if that labor is applied through machinery, will not make a manufacture unless it has progressed so far that a transformation ensues and the article becomes commercially known as another and different

> article from that with which it began its existence. (See also *Bumgarten* v. *Magone*, 50 F. R., 69; *United States* v. *Summer*, 41 F. R., 324; Carr on Jud. Interpretation of Tariff Laws, p. 166, *et seq.*)
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> Treasury Decisions, vol. 2, p. 993.

Mr. Justice Brown, in *Tide Water Oil Co.* against *The United States*, 171 U. S., 216, succinctly defines the word as follows:

> The word [manufacture] is now ordinarily used to denote an article upon the material of which labor has been expended to make the finished product.

The necessity of manufacture of the material imported in order that the drawback may be allowed has been frequently dwelt upon by this court.

> The purpose of the drawback provision is to make duty free imports which are manufactured here and then returned from whence they came or to some other foreign country.
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> *Campbell* v. *United States*, 107 U. S., 413.
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> The rule laid down in the proviso for determining the amount of drawback evidently had relation to articles manufactured from materials.
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> *United States* v. *Allen*, 163 U. S., 503.
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> What was doubtless meant was to allow this drawback upon articles manufactured within the United States either from the raw material or from material which was the result of the last complete manufacture.
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> *Tide Water Oil Co.* (*supra*), p. 219.

The foregoing cases of Allen and the Tide Water Oil Company are especially relied upon by the Court of Claims in its opinion in this case.

It is true that for a time claims for drawback similar to the one under consideration were allowed by the Treasury Department, but when that Department came to itself it reversed its former ruling by a decision made April 15, 1893, as follows:

> A drawback is allowed upon imported barley, rice, hops, etc., actually used in the manufacture or production of beer, and is paid on the exportation of such beer. But the Department does not recognize bottles, corks, and tin foil as in any way the ingredients entering into the manufacture or production of beer, and has therefore no authority under the law to establish a rate of drawback upon such articles.
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> Synopsis of Decisions for 1893, No. 13921, p. 328.

This decision has since been adhered to by the Treasury Department.

Claims identical with this have been sued upon in two instances in the Federal courts. In the case of *Wheeler* v. *The United States* (75 Fed. Rep., p. 654) the court, in its opinion, makes the following citation from the case of *United States* v. *Charles R. Allen* (163 U. S., 503):

> In the course of his opinion Mr. Justice White, in touching upon the meaning of the word "material," as used in section 25, said: "An added circumstance weighing against the

> construction that the proviso was intended to continue the drawback in question is the fact that the rule laid down in the proviso for determining the amount of drawback evidently had relation to articles manufactured from 'materials,' and not to a raw material like coal, in the production of which no materials are used which enter into and form a part of the product."

And thereupon concludes:

> This language clearly determines that the section relates to materials from which articles of exportation are manufactured or produced, and not to their coverings or packages.

And in *Beadleston et al.* v. *The United States* (104 Fed. Rep., 295), recently decided in the district court for the southern district of New York, the court held:

> The question is, are the *bottle, the cork, and the tin foil* "materials *used* in the *manufacture*" of the "*article*" exported? The article is labeled "Imperial Beer Brewed Specially for Export—Gold Label, etc." Mere cases or coverings are not deemed a part of the "article exported" and do not enter into its "manufacture." Notwithstanding the evidence as to steaming I think on full consideration that the "article" is essentially the *beer*, without reference to the bottle; that the bottle is not a material part of the identity of the *beer* or of its quality or marketable identity as beer, but only a convenient *case* for offering it to the public in a specific recognizable form which serves no other essential use. As such I think the bottles, corks., etc.,

are not entitled to a drawback under the act of October 1, 1890.

Wheeler v. *The United States* (75 F. R., 654).

This seems a most reasonable and natural view of the question. The corked bottle performs the same office with respect to the beer which it contains that a keg does to keg beer. In addition to being what is technically called the "package" of the beer, it operates to retain the carbonic-acid gas with which the beer is charged during its manufacture, and which gives it its *life*. It is, as compared with the keg, simply a superior package. As well, it would seem, might it be contended that the keg is a part of keg beer, the can of "canned lobster," the bag of "salt in bags," the hogshead of "wine in hogsheads," and the crate of "crated cheese," as that bottles and corks are a part of bottled beer.

And undoubtedly counsel for claimant are struck with the force of this argument, since they have presented evidence, appearing in the findings of the court, covering the whole ground of the process of manufacture of both keg and bottled beer, and place much stress upon the fact that it appears from these facts that there are many elements of difference between the process of manufacture of keg beer and that of bottled beer, although the general process is the same in each case.

As set forth in the brief of counsel for claimant, these differences of process consist:

In the elimination, as far as possible, of albuminoids in the beer intended for bottling, for the reason

that these albuminoids produce, in a short time, turbidity in the beer, and thus injure its appearance, although the same elements in the keg beer are desirable because of the agreeable flavor which they give to it.

And, finally, the bottled beer requires, in order that it may reach a finished state, that it should be sterilized or pasteurized to destroy the yeast germs in the beer, which, in time, would also produce in it an unpleasant cloudiness.

The evidence in the case shows that this pasteurizing can only be accomplished with complete success by steaming the beer in the bottles after it has been bottled and corked. Thus, the bottle, which finally becomes merely the covering or package of the beer, is first made use of as an appliance in which to complete the process of its manufacture. In this respect it will be seen that the bottle sustains no more necessary relation to the manufacture of the bottled beer than do the various other appliances which are used in the process of its manufacture. It may indeed be looked upon as the final appliance in the manufacture of beer bottled for export. And the bottle is not necessarily put to this use when the bottled beer is intended for local use. (Findings IX and XI.)

It should be observed in this connection that pasteurizing is no more essential to the successful manufacture of bottled beer for export than is the elimination of the albuminoids. Why, then, do not the appliances which are used for the elimination of albuminoids enter into the manufacture of the beer as much as the bottle does

which is used as an appliance in the pasteurizing of the beer? It seems plain that the contention of the claimant would never have been made if it were not for the coincidence that the bottle, after it has been used in steaming or pasteurizing the beer, is retained as its covering. In other words, if the beer after having been pasteurized in bulk, which the findings show can be done (Finding IX), could then be drawn into bottles without contamination from the atmosphere, the claimant would never have thought of contending that the bottle was anything more than a mere covering for the beer. His whole argument seems to be based upon the fact that after the bottle is used as an appliance in which to pasteurize the beer it accompanies the beer on its subsequent sale, instead of remaining in the brewery with the other appliances. The difficulty with the contention of the claimant is that he overlooks the well-established interpretation of the word "manufacture"—that the material or article employed must be transformed in the process of manufacture into another and different article, else it is not manufactured.

Further confirmation of the position of the Government in this case is found in the fact (Finding X) that in the course of trade, both between wholesalers and retailers and the retailers and their customers, a separate account is made of the bottles, and on return of the bottles the purchaser is credited with the value of the same. This would seem to be a species of divorcement of the beer and the bottle—the twain that counsel have so lastingly joined together in their argument.

It goes to show clearly that the article that is purchased and desired is the beer, to which the bottle is but an incident, and that after the desired article is consumed, the bottle, rejected and undiminished, is ready to be returned to be again filled therewith.

THE PURPOSE OF THE STATUTE.

The chief reliance of the counsel for appellants is here, as in the Court of Claims, upon an argument based upon the supposed intention of Congress in enacting the drawback statute. This argument met with the most respectful treatment in the opinion of the Court of Claims, but was answered in this wise:

> Nevertheless, if the intention was to put the American manufacturer upon an equal footing with the foreign manufacturer in foreign markets, the legislation of Congress has been imperfect and incomplete, and the courts, moreover, have deemed themselves confined to the words of the statutes when ascertaining the legislative intent.

Conceding the force of the argument as presented to this court, it would seem that the above is still its conclusive answer. The language of the statute is perfectly plain and unambiguous, and hence there is no room for *construction*, no reason for inquiry into its purpose.

> *Lake County* v. *Rollins*, 130 U. S., 670–1.
>
> *St. Paul, &c., Railway Co.* v. *Phelps*, 137 U. S., 536.

In the language of Mr. Justice Lamar in the latter case—

> When the statute is free from all ambiguity, the letter of it is not to be disregarded in favor of a presumption as to the policy of the Government.

The same appeal was most eloquently and persuasively made to this court in a recent notable case, and yet the majority of the court felt constrained to disregard it. In delivering that opinion Mr. Justice Harlan said:

> We can not do that without going far beyond the obvious import of the words employed by Congress. * * * This court has nothing to do with questions of mere policy that may be supposed to underlie the action of Congress. What is termed the policy of the Government in reference to any particular subject of legislation this court has said "is generally a very uncertain thing, upon which all sorts of opinions, each variant from the other, may be formed by different persons. It is a ground much too unstable upon which to rest the judgment of the court in the interpretation of statutes." *Hadden* v. *The Collector* (5 Wall., 107, 111). Our province is to declare what the law is, and not, under the guise of interpretation or under the influence of what may be surmised to be the policy of the government, so to depart from sound rules of construction as in effect to adjudge that to be law which Congress has not enacted as such. Here the language used by Congress is unambiguous. It is so clear that the mind at once

recognizes the intent of Congress. Interpreted according to the natural import of the words used, the statute involves no absurdity or contradiction, and there is consequently no room for construction. Our duty is to give effect to the will of Congress as thus plainly expressed. (*United States* v. *Fisher*, 2 Cranch, 358, 399; *Lake County* v. *Rollins*, 130 U. S., 662, 670.)

Dewey v. *United States* (178 U. S., 520 and 521).

The claimant can scarcely look for a less strict application of the rule in this case than that made to the claim of the gallant victors of Manila Bay.

It is respectfully urged that the judgment of the Court of Claims in this case should be affirmed.

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